S.B.Civil Second Appeal No.264/2004

Nav Bharat Marble Industries

vs.

Ajmer Vidhyut Vitran Nigam Ltd. & Others.

Date : 23.8.2005

HON'BLE MR. PRAKASH TATIA, J.

Mr. Suresh Srimali, for the appellant.

Mr. Ravi Bhansali, for the respondents.

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Heard learned counsel for the parties.

The brief facts of the case are that the plaintiff/ appellant filed a suit with a title “for permanent injunction”. According to the plaintiff, the respondent Ajmer Vidhyut Vitran Nigam Ltd. wrongly recovered amount of Rs.1,26,364.70p from the plaintiff by wrongly calculating power consumption for the plaintiff's factory electricity connection. According to the plaintiff, the plaintiff, even submitted an application in writing for testing the meter. Even then for about one year, the defendant did not take care of correcting the meter and ultimately, on 2.3.1994, KVH meter was tested and it was found that the meter was running fast. According to the plaintiff, because of this fast running of the meter only, no power factor was recorded by the meter resulting into excess charges of the electricity supply by the defendant, therefore, the plaintiff was entitled for adjustment of Rs.1,26,364.70p in

future bills and the defendant had no right to disconnect the electricity supply of the plaintiff's unit.

The defendants submitted reply and categorically stated that KVH meter was not defective nor it has affected the power factor. It is submitted that since the plaintiff was to maintaining power factor, therefore, the electricity charges were recovered by the plaintiff in accordance with the Rules, therefore, the plaintiff is not entitled for adjustment of any amount. However, the defendant admitted that on 2.3.1994 when the KVH meter was tested, it was found running fast but that was not to such extent which can affect the power factor in any manner. It was also found that the only some effect was on power factor because of the fast running of the meter. The respondent itself calculated the amount and adjusted it. Therefore, the plaintiff's suit deserves to be dismissed.

The trial court framed five issues. The burden to prove issue no.1 was upon the plaintiff. The issue no.1 is that whether the KVH meter installed in the factory of the plaintiff was defective and was running fast every month resulting in low recording of power factor and because of that reason, the defendants illegally recover the excess amount from the plaintiff for the period starting from September, 1991 to March, 1994. The burden, though specifically has not been mentioned for the issues no.2, 3, 4 and 5, but it appears that the burden to prove the issues no.3 and 4 was on the defendants.

In the trial court, neither the plaintiff nor the defendants produce any evidence.

The trial court held that since the plaintiff did not produce any evidence to prove the issue no.1, therefore, the plaintiff failed to prove that the excess charges were illegally recovered from the plaintiff. The trial court also decided issue no.2 against the plaintiff but decided the issue no.3 against the defendants as the defendants did not produce any evidence. It appears that the issues no.4 and 5 were decided against the defendants as none of the parties argued on these issues. However, on the basis of decision given on issue no.1, the suit was dismissed by the trial court vide judgment and decree dated 13.8.1997. The plaintiff preferred appeal against the said judgment which was dismissed by the appellate court on 22.7.2004. Hence, this second appeal.

According to learned counsel for the appellant, the plaintiff's suit should have been decreed on the basis of the averments made by the written statement by the defendants.

Learned counsel for the appellant read over the plaint and written statement in support of his contention and in the alternative, orally pleaded that the plaintiff may be allowed to produce evidence now.

I have considered the submissions of learned counsel

for the parties and perused the reasons given in the judgments of the two courts below.

It is true that the plaintiff narrated the procedure for calculating the power consumption with respect to KVH meter also and that procedure was admitted by the defendants. Despite above, it is clear that the plaintiff's contention that in case of the plaintiff, the amount starting from the month of September, 1991 from March, 1994 was wrongly and illegally recovered by the respondent, the plaintiff did not appear in the witness box. When the defendants very categorically controverted the plaintiff's case by saying that even by fast running of KVH meter, power factor was not affected, as stated by the plaintiff, then it was the duty of the plaintiff to prove or atleast give his statement on oath by proving the relevant bills that what should have been the actual charges and what has been recovered from the plaintiff. Assuming for the sake of arguments that this fact also will not affect materially, even then it was the initial duty of the plaintiff to prove the issue no.1 by producing his evidence whatever he would have liked which includes evidence of any expert to prove that in the case of the plaintiff, the power factor was adversely affected because of the fast running of the KVH meter, that has not been done by the plaintiff. The burden to prove the issue no.3 was upon the defendants but the issue no.3 appears to be a rebuttal issue of the issue no.1 only.

The appellate court held that this is not a case of

total admission of the defendants in any manner in the pleadings, therefore, I do not find any substantial question involved in this appeal.

Learned counsel for the appellant's oral prayer for allowing the plaintiff to lead evidence now cannot be accepted because the plaintiff voluntary closed its evidence and the judgment and decree cannot be set aside just for asking.

Accordingly, this second appeal, having no merit, is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya